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**DOWELL v. COX.**

Sept. 10, 1908.

[62 S. E. 27.]

**1. Limitation of Actions—Raising Defense—Demurrer.**—Where a statute of limitations affects the right as well as remedy, and it appears of record that the period of limitations has expired, the defense may be raised by demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 670-675.]

**2. Death—What Law Governs.**—Where the alleged wrongful death of plaintiff's decedent occurred while he was temporarily in North Carolina, the laws of that state relating to liability for wrongful death, certainly as to the extent of the remedy, controlled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 12.]

**3. Statutes—Foreign Laws—Pleading.**—The statutes of a foreign state will not be judicially noticed, but if relied on must be pleaded and proved as other facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 380.]

**4. Death—Statutes—Remedy—Enforcement—Time.**—Revisal 1905, N. C., § 59, gives a right of action for death by wrongful act, and declares that the action must be brought within one year. Held, that the time within which the action must be brought was a part of the right created by the statute, and hence no action thereon could be maintained in Virginia after the expiration of the time so fixed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 52, 53.]

Error to Circuit Court. Grayson County.

Action by one Dowell, as administrator of Grimsley Halsey, against Edward Cox. Judgment for defendant, and plaintiff brings error. Affirmed.

HARRISON, J. This action was brought, and an attachment issued and levied as ancillary thereto, for the purpose of recovering damages from the defendant, Edward Cox, for killing, as alleged, Grimsley Halsey, the plaintiff's intestate.

A general demurrer to the plaintiff's declaration was sustained, and the action dismissed, upon the ground that the alleged trespass, if committed at all, had not been committed within 12 months next preceding the institution of the action, and that the plaintiff's right to recover was therefore barred by the statute of limitations.

It was properly conceded at the bar of this court that the defense of the statute of limitations could be made in this case by demurrer. Wherever the statute affects the right as well as the remedy, and it appears of record that the period of limita-

tion has expired, the defense can be made by demurrer. *Lambert v. Ensign Mfg. Co.*, 42 W. Va. 813, 26 S. E. 431.

In the case of *Manuel, Adm'r, v. M. & W. Ry. Co.*, 99 Va. 188, 37 S. E. 957, this court held that, when the declaration in an action for death by wrongful act shows on its face that the death occurred more than 12 months before action brought, advantage may be taken of the limitation by demurrer. This conclusion was clearly because, in such cases, the limitation affects the right as well as the remedy.

The grievance here complained of is alleged to have been inflicted while the parties were temporarily absent from this state, and in the state of North Carolina. It is therefore properly conceded that the laws of North Carolina govern—certainly as to the extent of the remedy. *Dennis v. Atlantic Coast Line R. Co.*, 70 S. C. 254, 49 S. E. 869, 106 Am. St. Rep. 746; *Nelson v. C. & O. Ry. Co.*, 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583.

The statute of a foreign state being relied on as the ground of recovery in this case, it is necessary that such statute should be alleged in the declaration. The statutes of foreign states will not be judicially noticed, but are considered facts which must be pleaded and proved as any other facts. 20 Ency. Pl. & Pr. pp. 598-601.

The laws of other states are universally regarded as facts which, independently of statute, must be specially pleaded wherever the *lex fori* requires other facts under like circumstances to be pleaded. *Minor, Conflict of Laws*, § 212.

The declaration in the case at bar sets forth, with sufficient particularity, section 59 of the North Carolina Code (Revisal 1905), which gives a right of action for the death of a person caused by the wrongful act, neglect, or default of another. By this statute, as alleged, which is known as "Lord Campbell's Act," the action must be brought within one year. Nowhere in the statute, as alleged, is there a saving clause. This statute, limiting the time within which the action must be brought, has been construed by the Supreme Court of North Carolina, in the case of *Taylor v. Cranberry Iron & Coal Co.*, 94 N. C. 525, 526, where it is said: "This is not strictly a statute of limitation. It gives a right of action that would not otherwise exist, and the action to enforce it must be brought within one year after the death of the testator or intestate, else the right of action will be lost. It must be accepted in all respects as the statute gives it. Why the action was not brought within the time does not appear, but any explanation in that respect would be unavailing, as there is no saving clause as to the time within which the action must be begun."

The action in the case at bar not having been brought, as shown by the declaration, for more than 15 years after the right accrued,

the statute alleged and the decision mentioned construing it would seem to be conclusive that the plaintiff's right of action was lost.

It is, however, insisted that the state of North Carolina has a statute which is very similar to section 2933 of the Virginia Code of 1904, under which it is claimed the limitation upon the right of action has been all the time suspended, by reason of the uninterrupted absence of the defendant from the state of North Carolina since the grievance complained of was committed.

It is not necessary to decide whether or not the saving statute mentioned has any application to the case at bar, for the reason that no such statute has been alleged in the declaration, and therefore cannot be considered.

There is no error in the judgment complained of, and it must be affirmed.

#### Note,

The rule is well settled that where a party seeks either to recover or defend under a foreign law, such law must be pleaded and proved like any other fact, since the court cannot, ex officio, take notice of the laws of a foreign state. *Phinney v. Phinney*, 17 How. Pr. (N. Y. supreme Ct.) 197; *Rothschild v. Rio Grande Western R. Co.*, 59 Hun (N. Y.) 454; *Hull v. Mitcheson*, 64 N. Y. 639; *Monroe v. Douglass*, 5 N. Y. 452; *Mason v. Wash*, 1 Ill. 39; *Roots v. Merriwether*, 8 Bush (Ky.) 401; *Jones v. Tennessee Bank*, 8 B. Mon. (Ky.) 122.

**Presumptions in Absence of Pleading.**—Where a foreign law is not properly pleaded and proved, the presumption is that it is the same as that of the state in which the action is brought. *Hill v. Grigsby*, 32 Cal. 55; *Hickman v. Alpaugh*, 21 Cal. 225; *Cox v. Morrow*, 14 Ark. 603; *Atkinson v. Atkinson*, 15 La. Ann. 491; *Crane v. Hardy*, 1 Mich. 56; *Cooper v. Reaney*, 4 Minn. 528; *Brimhall v. Van Campen*, 8 Minn. 13; *Warren v. Lusk*, 16 Mo. 102; *Houghtaling v. Ball*, 19 Mo. 84; *State v. Patterson*, 2 Ired. L. (N. Car.) 346; *Robinson v. Dauchy*, 3 Barb. (N. Y.) 20; *Green v. Rugely*, 23 Tex. 539; *Territt v. Woodruff*, 19 Vt. 182; *Rape v. Heaton*, 9 Wis. 328; *Walsh v. Dart*, 12 Wis. 635.

**In an action for death by wrongful act** occurring in another state the statute of limitations of the forum governs, unless the statute giving the right of action in such other state itself prescribes a limitation, in which case such limitation will govern, as the period during which the action must be brought relates to and qualifies the right itself instead of affecting the remedy. *Weaver v. Baltimore, etc., R. Co.*, 21 D. C. 499; *Selma, etc., R. Co. v. Lacey*, 49 Ga. 106; *Hamilton v. Hannibal, etc., R. Co.*, 39 Kan. 56, 18 Pac. 57; *Dailey v. New York, etc., R. Co.*, Misc. 539, 57 N. Y. Suppl. 485; *Cavanaugh v. Ocean Steam Nav. Co.*, 13 N. Y. Suppl. 540, 19 N. Y. Civ. Proc. 391; *The Harrisburg*, 119 U. S. 199, 7 S. Ct. 140, 30 L. Ed. 358; *Stern v. La Compagnie Generale Transatlantique*, 110 Fed. 996; *Theroux v. Northern Pac. R. Co.*, 64 Fed. 84, 12 C. C. A. 52; *Munos v. Southern Pac. Co.*, 51 Fed. 188, 2 C. C. A. 163; *Boyd v. Clark*, 8 Fed. 849.

**With regard to the manner of pleading a foreign law**, it may be stated as a general rule that such law must be pleaded with sufficient distinctness to enable the court to judge of its effect. *Roots v. Merriwether*, 8 Bush (Ky.) 397; *Phinney v. Phinney*, 17 How. Pr. (N. Y. Supreme Ct.) 197; *Berney v. Drexel*, 33 Hun (N. Y.) 34.

See note to *State v. Behrman*, 25 L. R. A. 449.